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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

No. 896

FRANK PATZKE, JR.,
Petitioner,
vs.
THE CHESAPEAKE & OHIO RAILWAY CO.,
a Virginia Corporation,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MICHIGAN

## BRIEF OF RESPONDENT IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MICHIGAN

# BRIEF OF RESPONDENT IN OPPOSITION

## OPINIONS BELOW

The opinion of the Circuit Court for the County of St. Clair, Michigan, is printed as Appendix A, Petitioner's Petition, page 19a, and is unreported. The order of the Circuit Court for the County of St. Clair, Michigan, is

printed as Appendix I, *infra*, and is unreported. The opinion and order are also printed in the record (R. 803a, R. 804a, respectively).

The opinion of the Supreme Court of the State of Michigan is printed as Appendix B (Petitioner's Petition, page 20) and is reported at 368 Mich. 190.

## JURISDICTION

The judgment of the Supreme Court of Michigan was entered on December 3, 1962. The time for filing the Petition ran on March 4, 1963. The Petition was filed March 6, 1963. An order granting an extension of time was not entered until March 5, 1963. Since the order granting the extension of time was entered subsequent to the final date on which the Petition could be filed, the Court does not have jurisdiction of this case. 28 U.S.C.A. §2101(c).

To the extent that the reasons set forth by Respondent for denying the writ of certiorari are deemed to go to the jurisdiction of this Court, Respondent respectfully asserts that this Court does not have jurisdiction to issue the writ. If, however, the Court does have jurisdiction, it is invoked under 28 U.S.C.A. §1257(3).

## STATUTES AND RULES INVOLVED

In addition to statutes set forth in the Petition, the following statutes and rules are pertinent:

Compiled Laws of Michigan, 1948, §650.28 (Mich. Stat. Ann. 1943 Rev., §27.2618), set forth in Appendix C *infra*.

Michigan Court Rule 23, Sec. 2; Michigan Court Rule 24; and Michigan Court Rule 67, Sec. 1, set forth in Appendices A, B and D, respectively, infra.

28 U.S.C.A. 2101(c), set forth in Appendix J, infra.

## PREFACE TO "QUESTIONS PRESENTED"

Respondent cannot accept the questions set forth by Petitioner since none of them were raised by petitioner on his appeal to the Supreme Court of Michigan and the "questions presented" improperly seek a general review on the merits of the case. However, if this Court is of the opinion that one or more of the matters covered by Petitioner's "questions presented" were properly raised by Petitioner, then Respondent would characterize the "questions presented" by this Petition as follows:

## QUESTIONS PRESENTED

I.

Is a judgment of the Highest Court of a State affirming the order of the Trial Court in granting Respondent a new trial and remanding the case to the Trial Court for a new trial judgment reviewable by this Court under 28 U.S.C.A. 1257(3)?

II.

Is a judgment of the Supreme Court of Michigan reviewable by this Court when the judgment merely affirms an order of the Trial Court granting Respondent a new trial and the order granting the new trial and the judgment

affirming the order rests upon independent and adequate state grounds?

III.

Where a judgment of the Supreme Court of Michigan has not decided a Federal question of substance not heretofore determined by this Court and has not decided a Federal question of substance contrary to the applicable decisions of this Court, is the judgment subject to review by this Court?

IV.

Does it constitute a violation of the Seventh Amendment to the Constitution of the United States for the Supreme Court of Michigan to enter a judgment affirming an order of the Trial Court granting Respondent a new trial on the grounds: that the verdict was contrary to the weight of the evidence; that the verdict was contrary to the law and the evidence; that there were errors in the admission of evidence; that there were errors in the instructions to the jury; that the verdict was grossly excessive; that the jury disregarded the Court's instructions; that Petitioner's counsel had made improper arguments to the jury; and that there was newly discovered evidence?

V.

When an FELA action is prosecuted in a State Court is the time, manner and circumstances under which a party must take exceptions to instructions to the jury matters of procedure governed by the law of the State?

VI.

Where Petitioner has failed to comply with Rule 23(f) of this Court by failing to point out to this Court where the record shows he has properly raised or reserved a Federal question for review by this Court, but merely seeks a general review on the merits of the case, and, further, where petitioner has failed to comply with Rule 22 of this Court by failing to timely file his petition, should not the petition be dismissed?

## PREFACE TO STATEMENT OF THE CASE

Respondent cannot accept Petitioner's "The basic facts" as a Statement of the Case because it is incomplete, incorrect, inaccurate, argumentative, opinionated and misleading. "The basic facts" state that the Trial Court granted Respondent a new trial on only one 'presently relevant ground", when the clear language of the order of the Trial Court sets forth multiple grounds for the granting of the order (Petitioner's Petition, Appendix C, p. 26; R. 785a, *et seq.*); it states that the Supreme Court of Michigan affirmed the order of the Trial Court upon only one ground, when the Judgment of the Michigan Supreme Court (Petitioner's Petition, Appendix D, p. 27) is clearly to the contrary; it understakes to set forth reasons for the Trial Court's action in granting a new trial contrary to the grounds set forth in the Trial Court's order; it fails to point out subsequent pleadings filed by Petitioner in which he affirmatively attacked the Release involved; it fails to point out the undisputed fact that Petitioner executed the Release for the recited consideration; and it fails to point out where in the record, Petitioner has raised any of the questions on appeal to the Supreme Court of Michigan which are incorporated in "The basic facts".

## STATEMENT OF THE CASE

On September 21, 1956, Frank Patzke, Jr., resident of Port Huron, Michigan, filed an F.E.L.A. action (R. 6a) in the Circuit Court of St. Clair County, Michigan, against Respondent seeking damages for an accident which occurred on December 3, 1955 in Port Huron, Michigan, allegedly caused by a defective hand brake. Respondent duly filed its answer (R. 12a), and, in accordance with the provisions of Michigan Court Rule 23, Sec. 3 (Appendix A, *infra*), set forth as an affirmative defense the fact that Petitioner had executed a good and valid Release of the claim (R. 14a) and by way of amendment to the affirmative defense set forth in its answer Respondent attached a copy of said Release to its answer (R. 14a, R. 15a, R. 16a, R. 17a). Thereafter, in accordance with Michigan practice and procedure, Michigan Court Rule 24 (Appendix B, *infra*), Petitioner, Frank Patzke, Jr., filed his reply to Respondent's affirmative defenses in which he attacked the Release as void on the grounds of fraud and mistake of fact (R. 17a, R. 18a, R. 19a, R. 20a, R. 21a). Thereafter Petitioner amended his declaration (R. 23a), attacking the Release as void on the grounds of fraud and mistake.

The case came on for trial, during which Petitioner admitted executing the Release for the recited consideration and thereafter attacked the Release as void on the grounds of fraud and mistake. At the conclusion of the trial the jury returned a verdict for Petitioner. Respondent's motions for directed verdict and for judgment *non obstante veredicto* were denied by the Trial Court (R. 783a). Judgment in favor of Petitioner was entered on the verdict (R. 784a). Subsequently the Trial Court, upon motion duly filed by Respondent (R. 785a), and pursuant to the law of

Michigan, Ch. 1948, §650.28 [Stat. Ann. 1943 Rev. §27.2618] (Appendix C, *infra*), entered the following order granting Respondent's motion for a new trial (Appendix I, *infra*; R. 804a):

> "At a session of said Court continued and held at the courthouse in the City of Port Huron, county and state aforesaid, this 2nd day of June, 1958.
>
> "Present: Honorable Edward T. Kane, Circuit Judge.
>
> "In this cause, upon reading and filing defendant's motion for new trial and the affidavits in support thereof and in opposition thereto, after argument by counsel for the respective parties, and briefs having been filed by both parties which were duly considered by the court, and the court being fully advised in the premises:
>
> "It is Therefore Ordered That said motion for new trial be and the same hereby is granted and a new trial allowed for the reasons as set forth in defendant's motion for new trial heretofore filed in this cause and because the verdict of the jury has resulted in a miscarriage of justice.
>
> "s Edward T. Kane,
> Circuit Judge."

Thereafter Petitioner perfected an appeal to the Supreme Court of Michigan, and, in accordance with Michigan Court Rule 67 (Appendix D, *infra*), set forth on the first page of his brief the sole question upon which the appeal was based, as follows (Appendix E, *infra*):

"STATEMENT OF QUESTIONS INVOLVED

"Did the Circuit Judge err in granting a new trial because he differed from the jury's determination of fact?

"Appellant says 'Yes.'
"Appellee says 'No.'
"The Circuit Court says 'No.'"

The Supreme Court of Michigan affirmed the order of the Trial Court granting Respondent a new trial on the grounds set forth in Respondent's motion for new trial, and, in its opinion characterized the question more broadly than the sole question raised by Petitioner on his appeal, saying (Appendix B, Petitioner's Petition, page 20):

"Plaintiff appeals, contending the trial judge abused his discretion in granting a new trial."

From the judgment of the Supreme Court of Michigan affirming the order of the Trial Court granting Respondent a new trial Petitioner seeks a writ of certiorari from this Court under the provisions of 28 U.S.C.A. §1257(3).

## REASONS FOR DENYING THE WRIT

I.

The opinion of the Supreme Court of Michigan affirming the order of the Trial Court granting Respondent a new trial and remanding the cause to the Trial Court for a new trial is not a final judgment reviewable by this Court under 28 U.S.C.A. §1257(3).

II.

The judgment of the Supreme Court of Michigan affirming an order of the Trial Court granting Respondent a new trial is not reviewable by this Court when the order granting the new trial and judgment affirming the order rests upon independent and adequate state grounds.

III.

The Supreme Court of Michigan has not decided a Federal question of substance not heretofore determined by this Court; nor has it decided a Federal question of substance in a way not probably in accord with applicable decisions of this Court; but, on the contrary, the language of the opinion is in accord with the applicable decisions of this Court in cases where the same question has been raised.

IV.

The judgment of the Supreme Court of Michigan affirming an order of the Trial Court granting Respondent a new trial on the grounds: that the verdict was contrary to the weight of the evidence; that the verdict was contrary to the law and the evidence; that there were errors in the admission of evidence; that there were errors in the instructions to the jury; that the verdict was grossly excessive; that the jury disregarded the Court's instructions to the jury; that Petitioner's counsel had made improper arguments to the jury; and that there was newly discovered evidence; does not constitute a violation of the Seventh Amendment to the Constitution of the United States.

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V.

When an F.E.L.A. action is prosecuted in a State Court the time, manner and circumstances under which a party must take exceptions to instructions to the jury is a matter of procedure governed by the law of the State and is not reviewable by this Court.

VI.

When Petitioner has failed to comply with Rule 23(f) of this Court in that he has failed to point out to this Court where the record shows he has properly raised or reserved a Federal question for review by this Court, and Petitioner further failed to comply with Rule 22 of this Court by failing to timely file his Petition the Petition should be dismissed.

## ARGUMENT

I.

**The opinion of the Supreme Court of Michigan affirming the order of the Trial Court granting Respondent a new trial and remanding the cause to the Trial Court for a new trial is not a final judgment reviewable by this Court under 28 U.S.C.A. §1257(3).**

This Court has repeatedly held that a judgment by the highest court of a State in which a decision could be had which merely remands the case for trial is not a final judgment reviewable under 28 U.S.C.A. §1257(3).

In *Cincinnati Street Railway Company v. Snell*, 179 U.S. 395, this Court stated on page 397:

> "We have held in too many cases even to justify citation, that a judgment reversing a case and re-

> manding it for a new trial, or for further proceedings of a judicial character, is totally wanting in the requisite finality required to support a writ of error from this court."

In *United States v. Denver and Rio Grande Railroad Company*, 191 U.S. 84, this Court stated on page 93:

> "As its judgment upon the first writ was merely for a reversal of the court below and for a new trial, such judgment, not being final, could not be made the subject of a writ of error from this court."

In *Urie v. Thompson, Trustee*, 337 U.S. 163, this Court stated on page 171:

> "From the opinions of the state supreme court we know judicially that its judgment negating the general claim for negligence was coupled with its subsequently repudiated conclusion that petitioner has stated a cause of action under the Boiler Inspection Act and that, consequently, the court remanded the cause for trial, not for dismissal. The judgment therefore was not final; it was interlocutory and not reviewable here within the meaning of our jurisdictional statute.' 28 U.S.C. (344(b) [now (1257(3)]."

The general rule set forth in *U.S. v. Denver and Rio Grande Railway Company*, *supra*, and *Urie v. Thompson Trustee*, *supra*, to the effect that judgments granting a new trial are not final and therefore not reviewable by this Court has been consistently followed in the United States Circuit Courts of Appeal. See *e.g.*, *Ford Motor Co. v. Bynum Motor Sales, Inc.*, 185 F. 2d 531 (CA 6); *Balicki v. Central Greyhound Lines, Inc. of New York*, 150 F. 2d 402 (CA 3).

It is abundantly clear that the Supreme Court of Michigan did not consider its judgment entered herein, which

affirmed the order of the Trial Court granting Respondent a new trial on multiple grounds, a final judgment. On page 4 of its opinion, the Supreme Court of Michigan said (Petitioner's Petition, Appendix B, P. 24):

> "'Even greater latitude is allowed the trial court in granting than in refusing new trials, and the appellate court will interfere more reluctantly where the new trial is granted than where it is denied, *since in such cases the rights of the parties are not finally settled* as they are where the new trial is refused." (Emphasis supplied.)

The fact that a judgment of a highest State court which merely remands a case to the Trial Court for a new trial is not a final judgment reviewable by this Court is cogently stated thusly by *Stern & Gressman*, Supreme Court Practice (3rd ed.) Sec. 3-12, page 77:

> "The most obvious non-final judgment of this character is one which orders a new trial following final disposition of the legal issues at stake."

In the instant case Petitioner seeks to have this Court review a judgment of the Supreme Court of Michigan which merely affirms an order of the Trial Court granting a new trial. Since judgments of this type are interlocutory and not final, they are not reviewable by this Court and the Petition should be dismissed.

## II.

**The judgment of the Supreme Court of Michigan affirming an order of the Trial Court granting Respondent a new trial is not reviewable by this Court when the order granting the new trial and judgment affirming the order rests upon independent and adequate state grounds.**

The legislature of the State of Michigan has provided as follows (CL. 1948, 605.2 [Stat. Ann. 1943 Rev. 27A.2618]):

> "No judgment or verdict shall be set aside or reversed, or a new trial be granted by any court in any civil case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice."

The constitutionality of the above-cited statute was never attacked or discussed by Petitioner at any time in these proceedings.

In the instant case the Trial Court's order granting Respondent's motion for new trial (R. 81a) was bottomed on all of the independent and adequate State grounds set forth in Respondent's motion for new trial (R. 78a, *et seq.*) and on the further ground that the verdict of the jury had resulted in a "miscarriage of justice". The judgment of the Supreme Court of Michigan was as follows (Petitioner's Petition, Appendix B, P. 27a):

> "We affirm the order of the trial court and remand for new trial. Costs to appellee."

The opinion of the Supreme Court of Michigan clearly shows the sole question raised by Petitioner on appeal to that court (Petitioner's Petition, Appendix B, p. 20):

> "Plaintiff appeals contending the trial judge abused his discretion in granting a new trial."

Rule 67, Sec. 1 (Appendix D, *infra*) of the Michigan Court Rules required Petitioner to set forth on page 1 of his brief to that court the questions involved in the appeal. Pursuant to said Rule the sole question raised by Petitioner was as follows (Appendix E, *infra*):

> "STATEMENT OF QUESTIONS INVOLVED
>
> "Did the Circuit Judge err in granting a new trial because he differed from the jury's determination of fact?
>
> "Appellant says 'Yes.'
> "Appellee says 'No.'
> "The Circuit Court says 'No.'"

In disposing of the sole issue raised by Petitioner the Supreme Court of Michigan, in its opinion, quoted the above-cited Michigan statute empowering the Trial Court to exercise its discretion in the granting of new trials and thereafter cited *Cooper v. Carr*, 161 Mich. 405 and *Hoskin-Maraiuville Paper Co. v. Bates Valve Bag Corp.*, 268 Mich 443, 450, supporting this position. The instant case, *Latzke v. Chesapeake & Ohio Railway Company*, 368 Mich. 190, was decided on December 3, 1962. The following term of court the Supreme Court of Michigan handed down its decision dated February 7, 1963 in *Herman v. Ploszczanski*, 369 Mich. 252, in which the instant case was cited at page 260 as authority for the proposition that the granting of a new trial is within the sound judicial discretion of the Trial

Court. Indeed, even the headnotes to the citation in *Pet'r's v. Chesapeake & Ohio Railway Company, supra*, clearly show that the judgment of the Supreme Court of Michigan rested on independent State grounds. Headnotes 1 and 2 of said citation appear as follows:

> "1. New Trial—Discretion of Court—Miscarriage of Justice.
>
> A trial judge is empowered to grant a new trial if in his opinion, after an examination of the entire cause, the court should decide there has been a miscarriage of justice (CL. 1948, §650.28)."
>
> "2. Same—Discretion of Court.
>
> A circuit judge has a wide discretion in granting or refusing a new trial either upon his own motion or that of the parties, somewhat greater latitude being allowed in granting same since it is not a final settlement of the rights of the parties."

Against this background Petitioner now argues that certain statements used by the Supreme Court of Michigan in its opinion in the instant case requires this Court to find the judgment of the Supreme Court of Michigan rested solely on the Federal ground that the Trial Court erred in instructing the jury with respect to the party upon whom rests the burden of proving the validity of a release. This argument must be dismissed since it completely ignores the fact that Petitioner never raised this Federal question on his appeal, therefore any statements in the Court's opinion regarding it were not necessary to the decision in the case; it ignores the decision in *Hermanek v. Pleszczynski, supra*, wherein the Supreme Court of Michigan has cited the instant case as authority for a trial judge to exercise his judicial discretion in granting new trials; it ig-

nores the clear language of the order of the Trial Court granting Respondent a new trial based upon several independent and adequate State grounds; and it ignores the clear language of the Judgment of the Supreme Court of Michigan, to wit (Petitioner's Petition, Appendix D, P. 27):

> "We affirm the order of the trial court and remand for new trial. Costs to appellee."

The clear language of the above-quoted judgment approves and adopts without reservation the entire order of the Trial Court (Appendix I, *infra;* R. 804a) granting Respondent a new trial on the multiple grounds set forth in the order.

This Court has repeatedly held that it reviews judgments, not statements in opinions and will not pass on federal questions discussed in opinions where it appears that the judgment rests on adequate State grounds. *Black, et al. v. Cutter Laboratories*, 351 U.S. 292.

As this Court stated in *Lynch, et al. v. New York ex rel. Pierson*, 293 U.S. 52, at page 54:

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it."

The above principle was reaffirmed by this Court on March 18, 1963 in *Edward M. Fay, Warden, et al., Peti-*

*Bowers v. Charles Noel*, 31 L.W. 4255, 4266, which in this Court said:

> "It is a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds, notwithstanding the co-presence of federal grounds."

In the instant case, Petitioner has failed to show affirmatively that a federal question was presented for decision to the highest Court of the State of Michigan, and that its decision of the federal question was necessary to the determination of the cause. On the contrary, it appears affirmatively that the judgment of the Supreme Court of Michigan was founded on independent State grounds permitting a Trial Court to exercise its sound judicial discretion in granting new trials pursuant to CL 1948, 650.28 [Stat. Ann. 1943 Rev. 27.2618] quoted above, also Appendix C, *infra*.

## III.

**The Supreme Court of Michigan has not decided a Federal question of substance not heretofore determined by this Court; nor has it decided a Federal question of substance in a way not probably in accord with applicable decisions of this Court; but, on the contrary, the language of the opinion is in accord with the applicable decisions of this Court in cases where the same question has been raised.**

It is Respondents' position that the judgment of the Supreme Court of Michigan *was not based solely* upon the erroneous instruction of the trial court that the burden of proving the validity of a release rests upon Respondent rather than Petitioner. Assuming, however, for the purposes of argument only, that this federal question of sub-

stance was decided by the Supreme Court of Michigan, and that its determination was necessary to support the judgment, the Petition should still be dismissed since the opinion of the Supreme Court of Michigan follows, verbatim, the opinion of this Court in *Callen v. Pennsylvania Railroad Co.*, 332 U.S. 625, which is the law today. Therefore, we are not confronted with a federal question of substance not heretofore determined by this Court nor are we confronted with a decision of a State court which has allegedly decided a federal question in a way probably not in accord with the applicable decisions of this Court; but, on the contrary, we have a State court opinion which follows verbatim the opinion of this Court in the *Callen* case, *supra*.

In *Callen*, *supra*, Respondent set forth as an affirmative defense in accordance with Fed. Rules Civ. Proc., Rule 8(c) (Appendix F, *infra*) a release which it had obtained from an injured employee. In the instant case Respondent set forth as an affirmative defense in accordance with Rule 23(3) of the Michigan Court Rules (Appendix A, *infra*) a release it obtained from Petitioner. Under both the Federal Rules of Civil Procedure and the Michigan Court Rules Respondent is required to set forth a release it has obtained from Petitioner as an affirmative defense. In both the *Callen* case, *supra*, and the instant case Petitioner *admitted* executing the Release and receiving the recited consideration. In *Callen*, *supra*, Petitioner specifically asked this Court to place the burden of establishing the validity of a release upon Respondent. This Court refused to change the well established law, saying at page 630:

> "* * * However persuasive the arguments there stated may be that inequality of bargaining power might well justify a change in the law, they are also a frank recognition that the Congress has made

no such change. An amendment of this character is for the Congress to consider rather than for the courts to introduce. If the Congress were to adopt a policy depriving settlements of litigation of their *prima facie* validity, it might also make compensation for injuries more certain and the amounts thereof less speculative. But until the Congress changes the statutory plan, the releases of railroad employees stand on the same basis as the releases of others. *One who attacks a settlement must bear the burden of showing that the contract he has made is tainted with invalidity, either by fraud practiced upon him or by a mutual mistake under which both parties acted.*" (Emphasis supplied.)

In its opinion, the Supreme Court of Michigan cites, with approval, the *Callen* case, *supra*, holding the Michigan law to be similar. Petitioner argues at length (Petitioner's Petition, pp. 10, 11 and 12) that the Supreme Court of Michigan did not mean what it clearly says in its opinion, to wit, (Petitioner's Petition, Appendix B, p. 25):

> "Federal law in regard to validity of releases under the Federal employers' liability act is similar to our State law."

apparently on the grounds that older Michigan decisions in other than release cases may have been treated differently. Next Petitioner argues that the opinion of the Supreme Court of Michigan should not have reaffirmed *Porth v. Cadillac Motor Car Co.*, 198 Mich. 501, which is to the same effect as the *Callen* case, *supra*. Regardless of Petitioner's urgency in presenting this matter, the plain fact remains that the Supreme Court of Michigan in the instant case reaffirmed *Porth v. Cadillac Motor Car Co.*, *supra*, as setting forth the law of Michigan with respect to release cases and held it to be similar to the Federal law. In any event, the law of Michigan with respect to release cases is not the

concern of this Court since that is clearly a matter of State law.

Next Petitioner would have this Court believe that the mere fact that Respondent set forth as an affirmative defense under Michigan Court Rule 23(3) (Appendix A, *infra*) the release which it obtained from Petitioner required Respondent to assume the burden of proving the validity of the release. This argument ignores the facts that Petitioner filed a Reply (R. 17a, *et seq.*) attacking the validity of the release; filed an amendment to his declaration (R. 23a *et seq.*) attacking the validity of the release; and during the trial of the case, admitted executing the release for the recited consideration and, thereafter, attacked its validity by way of testimony on the grounds of fraud and mistake of fact. *There was nothing unusual about the way this release was introduced into the case. It was introduced in this case in the same way as releases are introduced in other cases, whether under the provisions of Federal Rule Civ. Proc. 8(c), Michigan Court Rule 23(3), or any other rule of pleading requiring Respondent to allege any matter which is likely to take Petitioner by surprise. This is the way releases are always introduced in any trial!*

The procedural rules of both the Federal Courts and State Courts requiring Respondent to set forth a release as an affirmative defense do not change the substantive law which requires the party attacking a release to bear the burden of showing it is tainted with invalidity. *The only requirement resting on Respondent is to show that it has obtained a Release from Petitioner.* In the instant case it is admitted that Petitioner executed the Release and received the recited consideration. Thereafter the burden was on Petitioner to show that the contract (Release) he has made is tainted with invalidity. The law of the *Callen*

case, *supra*, was cited and followed in so many decisions our Federal Courts of Appeals and State Courts of last resort that citations are too numerous to mention, e.g. *Parris v. Pennsylvania R. Co.*, 198 F. 2d 731, cert. den. 344 U.S. 898; *Cameglia v. New York Cent. R. Co.*, 199 F. 2d 698; *Cleghorn v. Terminal Railroad Ass'n of St. Louis*, 289 S.W. 2d 13.

## IV.

**The judgment of the Supreme Court of Michigan affirming an order of the Trial Court granting Respondent a new trial on the grounds: that the verdict was contrary to the weight of the evidence; that the verdict was contrary to the law and the evidence; that there were errors in the admission of evidence; that there were errors in the instructions to the jury; that the verdict was grossly excessive; that the jury disregarded the Court's instructions; that Petitioner's counsel had made improper arguments to the jury; and that there was newly discovered evidence, does not constitute a violation of the Seventh Amendment to the Constitution of the United States.**

Although this matter was not timely raised by Petitioner on his appeal to the Supreme Court of Michigan, he alludes to it in Question IV of Questions Presented, as follows:

"IV.

"Did the setting aside of the verdict and judgment because the trial judge disagreed with the jury's determinations of fact constitute a violation of the Seventh Amendment to the Constitution of the United States?"

The instant case, of course, was prosecuted in the State Courts of Michigan. The statute of the State of Michigan (CL 1948, §650.28 [Stat. Ann. 1943 Rev. §27.2618]) which authorizes the Trial Court to grant a new trial when, in its opinion, after an examination of the entire cause, it is of the opinion that for one or more reasons there has been a miscarriage of justice, was never alleged to be unconstitutional or attacked on any other grounds. On the contrary, the statute was never mentioned by Petitioner in the entire proceedings.

With respect to Petitioner's contention, that the action of the Trial Court in granting Respondent a new trial, and the action of the Supreme Court of Michigan in affirming the granting of a new trial constituted a violation of the Seventh Amendment to the Constitution of the United States, we respectfully refer the Court to its decision in *Minneapolis & St. Louis Railroad Company v. Bombolis, Administrator of Nanos*, 241 U.S. 211. This was an FELA case wherein Petitioner, against whom judgment had been entered, contended that the judgment was void since the verdict upon which it was based was rendered by a jury, admittedly no constituted in accordance with the common law, and therefore Petitioner urged a violation of the Seventh Amendment to the Constitution of the United States. In denying Petitioner's contention this Court said at page 217:

> "Two propositions as to the operation and effect of the Seventh Amendment are as conclusively determined as is that concerning the nature and character of the jury required by that Amendment where applicable. (a) That the first ten Amendments, including of course the Seventh, are not concerned with state action and deal only with Federal action. We select from a multitude of cases those which we deem to be leading. *Barron v. Baltimore*, 7 Pet.

243; *Fox v. Ohio*, 5 How. 410, 434; *Twitchell v. Commonwealth*, 7 Wall. 321; *Brown v. New Jersey*, 214 U.S. 78, 93. And, as a necessary corollary, (b) that the Seventh Amendment applies only to proceedings in courts of the United States and does not in any manner whatever govern or regulate trials by jury in state courts or the standards which must be applied concerning the same. *Livingston v. Moore*, 7 Pet. 469, 552; *The Justices v. Murray*, 9 Wall. 274; *Edwards v. Elliott*, 21 Wall. 532; *Walker v. Sauvinet*, 92 U.S. 90; *Pearson v. Yewdall*, 95 U.S. 294. "So completely and conclusively have both of these principles been settled, so expressly have they been recognized without dissent or question almost from the beginning in the accepted interpretation of the Constitution, in the enactment of laws by Congress and proceedings in the Federal courts, and by state constitutions and state enactments and proceedings in the state courts, that it is true to say that to concede that they are open to contention would be to grant that nothing whatever had been settled as to the power of state and Federal governments or the authority of state and Federal courts and their mode of procedure from the beginning."

The provisions of the Seventh Amendment to the Constitution of the United States do not apply to actions prosecuted in our state courts. Therefore, the action of the Trial Court, affirmed by the Supreme Court of Michigan, in setting aside the jury verdict and granting Respondent a new trial under the well established law of the State of Michigan is not subject to review by this Court on the grounds that such action constituted a violation of the Seventh Amendment.

If we were to assume for the moment, for the purposes of argument only, that the instant case had been prosecuted

in the Federal courts, the Petition should still be dismissed since the right to grant a new trial in the Federal courts for the same reasons, which were advanced in the instant case has long been recognized. Fed. Rules Civ. Proc., Rule 59(a), 28 U.S.C.A. (Appendix G, *infra*) recognizes the basic common law principle that it is the duty of the judge who is not satisfied with the verdict of a jury to set the verdict aside and grant a new trial. *Barron and Holtzoff* (Wright Ed.), Federal Practice and Procedure, Vol. 3, §1302. The inherent right and power of the Courts to set aside a verdict and grant a new trial is so well recognized that citing of authorities is superfluous. The reasons and necessity for giving the courts this discretionary power is ably stated in *Aetna Casualty & Surety Co. v. Yeatts*, 122 F. 2d 350 and *Southern Pac. Co. v. Guthrie*, 186 F. 2d 926.

In *Aetna Casualty & Surety Co. v. Yeatts*, *supra*, with reference to a motion for new trial, the Court said at page 352:

> "On such a motion it is the duty of the judge to set aside the verdict and grant a new trial, if he is of opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict. The exercise of this power is not in derogation of the right of trial by jury but is one of the historic safeguards of that right."

In *Southern Pac. Co. v. Guthrie*, *supra*, in discussing the authority of a trial court to grant a new trial, the court said at page 933, note 11:

> "The authority of the common pleas in the control and revision of excessive verdicts through the means of new trials were firmly settled in England

> before the foundation of this colony, and has always existed here without challenge under any of our constitutions. It is a power to examine the whole case on the law and the evidence, with a view to securing a result, not merely legal, but also not manifestly against justice,—a power exercised in pursuance of a sound judicial discretion *without which the jury system would be a capricious and intolerable tyranny*, which no people could long endure. This court has had occasion more than once recently to say that it was *a power the courts ought to exercise unflinchingly*."

This Court fully recognizes the right of a trial court to grant a new trial. In *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, this Court said, at page 251:

> "* * * The motion for a new trial may invoke the discretion of the court in so far as it is bottomed on the claim that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving; and may raise questions of law arising out of alleged substantial errors in admission or rejection of evidence or instructions to the jury."

In *3 Barron and Holtzoff, Federal Practice and Procedure*, §1302.1, the following is noted on page 355:

> "By way of summary, the discretion of the trial court in passing on a motion for a new trial where it is claimed that the verdict is against the weight of the evidence is not subject to review. * * *"

Professor James W. Moore reaches the same conclusion in *6 Moore's Federal Practice*, ¶59.08, where he states, on page 3816:

> "A motion for new trial, unlike the motion for directed verdict or for judgment n.o.v., does not

> seek a final judgment, but, as the term implies, another trial. And unlike those other motions, a motion for new trial is addressed to the sound discretion of the trial court; and the grant or denial of a motion for new trial is not reviewable, except where the trial court acts under the compulsion of a mistake of law, or lacks power to grant the motion, as where the motion is not timely, or where the trial court fails to exercise its discretion, or where it abuses its discretion. And a motion for new trial on the ground that the verdict is against the weight of the evidence and the trial court's ruling thereon are within the foregoing principles."

In his argument (Petitioner's Petition, p. 16) Petitioner lays great stress on this court's decision in *Schulz v. Pennsylvania R. Co.*, 350 U.S. 523, 524, as supporting his position that the action of the Trial Court in setting aside the verdict and judgment constituted a violation of the Seventh Amendment to the Constitution of the United States. Again, as in the court below, Petitioner makes the gross error of failing to distinguish between a case where the trial court directs a verdict or sets aside a jury verdict and enters judgment for the opposite party, and the case where a new trial in granted. In framing his Question IV to this Court Petitioner neglects to assert the fact that a new trial was granted Petitioner, and in citing *Schulz v. Pennsylvania R. Co., supra*, Petitioner fails to point out to this Court that *Schulz* was a case in which a verdict was directed for Respondent. Petitioner's handling of this matter is patently misleading since the instant case is not concerned with the direction of a verdict by the trial court. Petitioner has not been deprived of a trial by jury in this cause, but rather has been granted a trial by a new jury. While there are certain limitations to the authority of a trial court to direct a verdict, the basic and historic right of a trial court to grant a new trial is not so circumscribed.

This basic and historic right to grant a new trial is well stated in the dissenting opinion of Mr. Justice Black, with whom Mr. Justice Douglas concurred, in *Galloway v. United States*, 319 U.S. 372, wherein they stated at page 400:

> "As Hamilton had declared in The Federalist, the basic judicial control of the jury function was in the court's power to order a new trial. In 1830, this Court said: 'The only modes known to the common law to re-examine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a *venire facias de novo*, by an appellate court, for some error of law which intervened in the proceedings.' *Parsons v. Bedford, supra*, at 448. That retrial by a new jury rather than factual reevaluation by a court is a constitutional right of genuine value was restated as recently as *Slocum v. New York Life Insurance Co.*, 228 U.S. 364."

The principle that our courts retain a basic judicial control of the jury function was fully recognized by this Court in the recent case of *Harris v. Pennsylvania R. Co.*, 361 U.S. 15, where the Court said *that the system of judicial supervision still exists in this (FELA) as in other types of cases.* The principle of judicial control by the Trial Court over the jury function is well recognized by this Court in *United States v. Socony-Vacuum Oil Co., Inc., et al.*, 310 U.S. 150, wherein Mr. Justice Douglas, speaking for the majority of the Court, stated, at page 247:

> "Hence this case falls within the well established rule that neither this Court nor the Circuit Court of Appeals will review the action of a federal trial court in granting or denying a motion for a new trial for error of fact, since such action is a matter within the discretion of the trial court. *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474. . . ."

and on page 248:

> "Certainly, denial of a motion for a new trial on the grounds that the verdict was against the weight of the evidence would not be subject to review. * * *"

This same principle was again affirmed by this Court in *United States v. Johnson*, 327 U.S. 106, where Mr. Justice Black, speaking for the majority of the Court, stated, at page 111:

> "* * * But it is not the province of this Court or the circuit court of appeals to review orders granting or denying motions for a new trial when such review is sought on the alleged ground that the trial court made erroneous findings of fact. *Holmgren v. United States*, 217 U.S. 509; *Holt v. United States*, 218 U.S. 245; *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 481." * * *"

One of the most cogent reasons for granting to the trial judge the discretionary power to grant or deny a new trial is the obvious fact that they preside where things happen that are visible to the human eye and audible to the human ear, yet never find their way into typed or printed pages so as to be part of an appellate review.

Since the granting of a new trial does not constitute a violation of the Seventh Amendment to the United States Constitution, and since the granting of a new trial is within the sound discretionary powers of the trial court, the Petition should be dismissed.

## V.

**When an F.E.L.A. action is prosecuted in a State Court the time, manner and circumstances under which a party must take exceptions to instructions to the jury is a matter of procedure governed by the law of the State and is not reviewable by this Court.**

Although Respondent contends that Petitioner's Question II listed under Questions Presented is not properly before this Court for review since Petitioner did not raise it on appeal, if we assume for the purposes of argument only that Question II was properly raised by Petitioner the Petition should still be dismissed because the subject raised is purely a question of procedure which is governed by the law of the State. Rules of practice with respect to instructions to the jury are matters of procedure which are governed by the law and practice of the State court. As this Court said in *Chesapeake and Ohio Railway Company v. DeAtley*, 241 U. S. 310, at page 316:

> "But it appears that in Kentucky there is an established rule of practice, that if instructions are offered upon any issue respecting which the jury should be instructed, but they are incorrect in form or substance, it is the duty of the trial court to prepare or direct the preparation of a proper instruction upon the point in the place of the defective ones. *Louisville & Nash. R.R. Co. v. Harriel*, 115 Kentucky 877, 882; *West Kentucky Coal Co. v. Davis*, 138 Kentucky 667, 674; *Louisville, H. & St. L. Ry. Co. v. Roberts*, 144 Kentucky 820, 824.
>
> "Although the present action was based upon a Federal statute, it was triable and tried in a state court, hence local rules of practice and procedure were applicable. *Central Vermont Ry. Co. v. White*, 238 U.S. 507, 511; *Minneapolis & St. Louis R.R. Co. v. Bombolis*, this day decided, ante, p. 241."

To the same extent, see *Atlantic Coast Line Railroad Company v. Mims, Administratrix of Mims, supra.*

Under Michigan law the Trial Court is required to correctly instruct the jury on the law of the case whether or not any specific instructions are tendered by the parties. Failure to do so is error. *Sakarraphos v. Eastman Kodak Stores, Inc.*, 367 Mich. 96, 116 N.W. 2d 227.

In the instant case Petitioner made no objection to Respondent placing upon the record its exceptions to the Court's instructions to the jury after the jury had been discharged. It had been previously agreed by all the counsel and approved by the Trial Court that any exceptions to the Court's instructions to the jury could be made after the instructions were given by the Trial Court and after the official transcript thereof was available for counsels' use. See Affidavit of the Trial Judge, Appendix H, *infra.*

## VI.

**When Petitioner has failed to comply with Rule 23(f) of this Court in that he has failed to point out to this Court where the record shows he has properly raised or reserved a Federal question for review by this Court, and Petitioner further failed to comply with Rule 22 of this Court by failing to timely file his petition the Petition should be dismissed.**

The burden is upon Petitioner to show that he timely raised and relied upon a federal question before the Supreme Court of Michigan; that the Supreme Court of Michigan decided the federal question; and that the decision was necessary to sustain the judgment of the Court. There is no presumption that it did so. This Court must be able to say clearly, from the whole record, that a cer-

tain provision of the Constitution or of an Act of Congress was "*relied on by the party who filed the Petition,*" and the right thus claimed by him was denied. *Chicago, Indianapolis and Louisville Railway Company v. McGuire*, 196 U.S. 128. (Emphasis supplied.)

Petitioner has failed to comply with Rule 23(f) of this Court, for nowhere in the Petition has Petitioner made any specific reference to the places in the record where the matters appear that will show a federal question was timely and properly raised by Petitioner so as to give this Court jurisdiction to review on writ of certiorari. Petitioner merely alludes to these questions on page 5 of his Petition as having been raised in the Trial Court but does not specifically refer to any place in the record where the alleged questions were raised by Petitioner. *The Petition is void of any specific reference to the places in the record where Petitioner has raised these questions on appeal.*

None of the four questions presented by Petitioner under his statement of "Questions Presented" in the Petition was raised by Petitioner on appeal to the Supreme Court of Michigan. On the contrary, the opinion of the Supreme Court of Michigan cited as Appendix B on page 20 of the Petition sets forth Petitioner's sole grounds of appeal to that court, to wit:

> "Plaintiff appeals, contending the trial judge abused his discretion in granting a new trial."

As heretofore pointed out by Respondent, the sole question raised by Petitioner on appeal to the Supreme Court of Michigan, pursuant to Michigan Court Rule 67(1) (Appendix D, *infra*), is set forth on the first page of his Brief to the Supreme Court of Michigan as follows (Appendix E, *infra*):

"STATEMENT OF QUESTIONS INVOLVED

"Did the Circuit Judge err in granting a new trial because he differed from the jury's determination of fact?

"Appellant says 'Yes.'
"Appellee says 'No.'
"The Circuit Court says 'No.'"

As this Court said in *Atlantic Coast Line Railroad Company v. Mims, Administratrix of Mims*, 242 U. S. 432, on page 535.

> "To become the basis of a proceeding in error from this Court to the Supreme Court of a State 'a right, privilege or immunity' claimed under a statute of the United States must be 'especially set up or claimed,' and must be denied by the state court. Rev. Stats., §709; Judicial Code, §237. This means that the claim must be asserted at the proper time and in the proper manner by pleading, motion or other appropriate action under the state system of pleading and practice. *Mutual Life Insurance Co. v. McGrew*, 188 U.S. 291, 308, and upon the question whether or not such a claim has been so asserted the decision of the state court is binding upon this court. * * *"

and on page 536:

> "While it is true that a substantive federal right or defense duly asserted cannot be lessened or destroyed by a state rule of practice, yet the claim of the plaintiff in error to a federal right not having been asserted at a time and in a manner calling for the consideration of it by the state Supreme Court under its established system of practice and pleading, the refusal of the trial court and of the Supreme Court to admit the testimony tendered in support of such claim is not a denial of a federal right which this court can review. *Baldwin v. Kansas*, 129 U.S.

52, *Ogden State Co. v. Butler County*, 166 U.S. 648, and therefore, for want of jurisdiction, the writ of error is *dismissed*."

In addition to the foregoing, Petitioner failed to comply with Rule 22 of this Court, for it appears that the judgment of the Supreme Court of Michigan was dated December 3, 1962. The time for filing the Petition ran on March 3, 1963 but since March 3 was a Sunday the time expired on March 4, 1963. An order was entered on March 5, 1963 granting Petitioner additional time in which to file the Petition. The Petition was filed on March 6, 1963. Since the order granting the extension of time in which to file a Petition was not granted until the time for filing had run, the Petition was not timely filed and should be dismissed.

Since the questions presented in this Petition were not timely and properly raised by Petitioner on appeal to the Supreme Court of Michigan and since the Petition was not timely filed, this Court does not have jurisdiction to review the judgment on writ of certiorari.

"This case is the not infrequent one of an attempt to clutch at the jurisdiction of this Court as an afterthought, when all other resources of litigation have been exhausted." *Chicago, Indianapolis and Louisville Railway Company v. McGuire*, *supra*.

## CONCLUSION

Since the rights of the parties heretohave not been finally decided by the judgment of the Supreme Court of Michigan, and for all of the other reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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# APPENDIX A

## MICHIGAN COURT RULES

### Rule 23(3)

### ANSWERS AT LAW AND IN EQUITY

Sec. 3. The facts constituting any affirmative defense, such as payment, release, satisfaction, discharge, license, fraud, duress, estoppel, statute of frauds, statute of limitations, illegality, that an instrument or transaction is either void or voidable in point of law, or cannot be recovered upon by reason of any statute, or by reason of nondelivery, want or failure of consideration, in whole or in part, and any defense which by other affirmative matter seeks to avoid the legal effect of or defeat the cause of action set forth in the plaintiff's declaration or bill of complaint, in whole or in part, and any ground of defense which, if not raised on the pleading, would be likely to take the opposite party by surprise, must be plainly set forth in the defendant's answer.

# APPENDIX B

## MICHIGAN COURT RULES

### Rule 24

### REPLIES

Sec. 1. New matter alleged in the answer filed in any action shall be answered by a reply in the same manner that allegations in the declaration or bill of complaint are required to be admitted or denied in the answer.

Sec. 2. If the plaintiff desires to meet any defense set up in an action at law by confessing and avoiding the same, the facts constituting such confession and avoidance shall be specifically pleaded in the reply.

Sec. 3. Whenever the pleading of the defendant contains a recoupment or set-off, the plaintiff shall file a reply to which he shall plead thereto in the same manner as though such recoupment or set-off were pleaded in a declaration.

# APPENDIX C

**Compiled Laws of Michigan. 1948. §650.28 [Mich Stat Ann 1943 Rev. §27.2618]**

No judgment or verdict shall be set aside or reversed, or a new trial be granted by any court in any civil case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

# APPENDIX D

## MICHIGAN COURT RULES

### Rule 67(1)

### APPELLANT'S BRIEF AND APPENDIX ON APPEAL TO SUPREME COURT

Sec. 1. Beginning on the first page of the brief appellant shall concisely and without repetition, under the heading "Statement of Questions Involved," state the questions involved in the appeal. Each question shall be numbered and set forth separately, in the briefest terms, and whenever possible, each question must be followed immediately by a statement as to whether the lower court answered it "Yes" or "No" or qualified it or failed to answer it, together with a statement that appellant contends that it should be answered "Yes" or "No" as the case may be. Ordinarily no point will be considered which is not set forth in or necessarily suggested by the statement of questions involved.

The stated questions herein required shall be used in the same order as topical subheadings throughout the "argument" in appellant's brief provided for in section 3 of this rule.

# APPENDIX E

## BRIEF ON APPEAL—APPELLANT'S

**Page i**

### STATEMENT OF QUESTIONS INVOLVED

Did the Circuit Judge err in granting a new trial because he differed from the jury's determination of fact?

Appellant says "Yes."
Appellee says "No."
The Circuit Court says "No."

### BIBLIOGRAPHY OF CITATIONS IN APPELLANT'S BRIEF ON APPEAL


| Citation | Page |
|---|---|
| Bridwell v. Segel, 362 Mich. 102 | 18 |
| Kosnicki v. Railway Co., 217 Mich. 245 | 17 |
| Lavender v. Kurn, 327 U.S. 645 (90 L. Ed. 916) | 20, 21 |
| McDuffie v. Root, 300 Mich. 286 | 17 |
| O'Day v. Chicago River & Indiana R. Co., 216 F. 2d 79 (CA 7) | 19 |
| Schulz v. Pennsylvania R. Co., 350 U.S. 523 (100 L. Ed. 668) | 18 |
| Congressional Act: | |
| Federal Employers Liability Act, 45 USC 51, et seq. | 18 |

State of Michigan—ss. In the Supreme Court
Clerk's Office

Donald F. Winters, *Clerk of the Supreme Court of the State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of* the first (preliminary) page of plaintiff's brief, filed September 23, 1961 *in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original.*

In Testimony Whereof, *I have hereunto set my hand and affixed the seal of said Supreme Court, at Lansing, this 20th day of April, A.D. 1963.*

Donald F. Winters,
*Clerk.*

# APPENDIX F

## FEDERAL RULES OF CIVIL PROCEDURE

## RULE 8. GENERAL RULES OF PLEADING

### Text of Rule

(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

# APPENDIX G

## FEDERAL RULES OF CIVIL PROCEDURE

### RULE 59. NEW TRIALS; AMENDMENT OF JUDGMENTS

#### Text of Rule

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

# APPENDIX H

State of Michigan—Supreme Court

Appeal from the Circuit Court for the County of St. Clair
Honorable Edward T. Kane, Circuit Judge

| | |
|---|---|
| Frank Patzke, Jr.,<br>Plaintiff and Appellant,<br>v.<br>Chesapeake & Ohio Railway Company,<br>a Virginia corporation,<br>Defendant and Appellee. | No. 48,724 |

## AFFIDAVIT

(Filed with this Court May 31, 1962)

Deponent, being first duly sworn, deposes and says that:

1. He is a Circuit Judge in and for the 31st Judicial Circuit, St. Clair County, Michgan;

2. He presided at the trial of the above captioned cause and was in attendance throughout the same;

3. At the conclusion of the proofs written requests to charge were submitted to the Court by counsel of both sides;

4. Due to the large number of such requests submitted and the considerable conflict between the instructions submitted by the opposing sides, the Court prepared its own instructions to the jury which were not made known to counsel of either side prior to the time that the jury was instructed;

5. Because of this circumstance it was agreed by all counsel that exceptions to the Court's instructions to the

jury could be made after they were given by the Court and after the official transcript thereof was available to counsel.

/s/ Edward T. Kane,
Circuit Judge.

Subscribed and sworn to before me this 28th day of May, A. D., 1962.

/s/ James P. Adair.
Notary Public, St. Clair County, Michigan.
My commission expires June 19, 1962.

State of Michigan—ss. In the Supreme Court
Clerk's Office

Donald F. Winters, *Clerk of the Supreme Court of the State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of* an affidavit signed by Edward T. Kane, Circuit Judge, filed May 31, 1962 *in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original.*

In Testimony Whereof, *I have hereunto set my hand and affixed the seal of said Supreme Court, at Lansing, this 20th day of April, A.D. 1963.*

Donald F. Winters,
*Clerk.*

# APPENDIX I

## TRIAL COURT'S ORDER GRANTING MOTION FOR NEW TRIAL

**Filed June 2, 1958**

At a session of said Court continued and held at the courthouse in the City of Port Huron, county and state aforesaid, this 2nd day of June, 1958.

Present: Honorable Edward T. Kane, Circuit Judge.

In this cause, upon reading and filing defendants' motion for a new trial and the affidavits in support thereof and in opposition thereto, after argument by counsel for the respective parties, and briefs having been filed by both parties which were duly considered by the court, and the court being fully advised in the premises:

It Is Therefore Ordered That said motion for new trial be and the same hereby is granted and a new trial allowed for the reasons as set forth in defendant's motion for new trial heretofore filed in this cause and because the verdict of the jury has resulted in a miscarriage of justice.

/s/ Edward T. Kane,
Circuit Judge

# APPENDIX J

## 28 U.S.C.A. §2101(c)

Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.